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In the Supreme Court of the United States

OCTOBER TERM, 1976

W. T. MAYFIELD SONS TRUCKING CO., PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals abused its discretion in affirming without opinion an order of the Interstate Commerce Commission interpreting a motor carrier's certificate of public convenience and necessity.

STATEMENT

In August 1971, the Interstate Commerce Commission instituted an investigation to determine whether petitioner was engaging in unauthorized transportation of property. The Commission found that certain shipments admittedly transported by petitioner were transported without appropriate authority (Pet. App. B). The Commis-

sion rejected petitioner's contention that its certificate of public convenience and necessity—authorizing the transportation of "[c]ontractors' machinery and equipment, not limited to such commodities as are intended solely for use by contractors" (Pet. App. 2b)—provided a basis for the operations. The Commission ordered petitioner to cease and desist from the unlawful operations (Pet. App. 25b).

Petitioner's original certificate, issued in 1946, authorized the transportation of "contractors' machinery and equipment" (Pet. App. 2b).[1] Petitioner's efforts to eliminate entirely the "intended use" restriction in its certificate led to 14 years of administrative and judicial litigation—recounted in detail in the Commission's report in the present proceeding (Pet. App. 7b-12b)—and culminated in an expansion of the original authority to include "[c]ontractors' machinery and equipment, not limited to such commodities as are intended solely for use by contractors."

In the present proceeding, both the administrative law judge and the Commission rejected the carrier's contention that the expanded certificate was no longer subject to any "intended use" restriction. Instead, the Commission found that the expanded certificate merely enlarged the

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[1]Commodity descriptions in motor carrier certificates identify the specific commodity to be transported, the generic classification involved, or the commodity's future intended use. *C & H Transp. Co., Inc., Interpretation of Certificate*, 62 M.C.C. 586, 587. A certificate covering "contractors' machinery and equipment," an "intended use" description, authorizes transportation only of such machinery and equipment as is intended for use by a contractor. However, a carrier operating under such a certificate need not ascertain the actual intended use of all machinery and equipment it proposes to transport; in the absence of knowledge or notice to the contrary, the carrier may presume that machinery and equipment predominantly used by contractors is intended for use by a contractor. *Point Pleasant Transp. Co., Inc., Declaratory Order*, 61 M.C.C. 666.

class of users to include "persons who are not contractors *when engaged in the performance of construction activities equivalent to those which a contractor performs*" (Pet. App. 13b; emphasis in original).

On petition for review, the court of appeals affirmed the Commission's order without opinion, pursuant to its Local Rule 21.[2]

ARGUMENT

Petitioner's sole contention is that the court of appeals improperly disposed of the petition for review without a written opinion containing "an articulated explanation of the grounds for its decision" (Pet. 20). As this Court has stated, however, "the courts of appeals should have wide latitude in their decisions of whether or how to write opinions," and "[t]hat is especially true with respect to summary affirmances. See Rule 21, Court of Appeals for the

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[2]Local Rule 21 provides:

Rule 21. Affirmance Without Opinion.

When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."

See *N.L.R.B. v. Amalgamated Clothing Workers of America*, 5th Cir. 1970, 430 F. 2d 966.

Fifth Circuit." *Taylor* v. *McKeithen*, 407 U.S. 191, 194, n. 4.[3]

The court of appeals did not abuse its broad discretion in affirming the Commission's order in this case without opinion. The key disputed issue before the Commission was the proper interpretation of that portion of petitioner's certificate that authorizes transportation of "[c]ontractors' machinery and equipment, not limited to such commodities as are intended solely for use by contractors" (Pet. App. 2b). The administrative law judge found that the certificate on its face was novel and ambiguous because it seemed both to suggest and to reject application of the "intended use test." He therefore resorted to the history of the certificate to determine its proper interpretation.[4]

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[3]The local rules of seven of the circuits now provide for the issuance of orders summarily affirming decisions of the district courts and administrative agencies. The Fifth Circuit adopted its Rule 21 after reviewing the "spectacular" increases in caseload in recent years and after concluding that it had a duty to fashion new methods or modify older ones "to at least stay abreast of this flood tide." *National Labor Relations Board* v. *Amalgamated Clothing Workers of America*, 430 F. 2d 966, 968, 970 (C.A. 5). The number of cases in the Fifth Circuit has continued to increase greatly. See *Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts 1975*, p. 331. This increase parallels the continuing growth in the amount of federal appellate litigation, which is up 12.4 percent from last year and is at record levels. *1976 Semi-Annual Report of the Director, Administrative Office of the United States Courts*, p. 1. Not surprisingly, the courts of appeals have decided an increasing proportion of cases without written opinions. *1975 Annual Report of the Director, Administrative Office of the United States Courts*, pp. XI-21, XI-22.

[4]*W. T. Mayfield Sons Trucking Co., Inc.*, I.C.C. Docket No. MC-C 7566, Report and Order of Administrative Law Judge, p. 4:

> The Administrative Law Judge is unaware of a grant of authority made to any other carrier such as the description in respondent's Sub-No. 8 certificate. The description in the Sub-No. 8 application lends itself to some confusion since it initially grants authority which is and has been coupled with the intended use test and then, to some extent, eliminates the intended use test with the final phrase of the grant. The authority presently held was granted only after extensive litigation extending over a period of several years. In view of the uncertainty and ambiguity in the description, it is worthwhile to consider the derivation and history to learn the Commission's intention in granting the Sub-No. 8 authority.

The Commission agreed with the administrative law judge—it described the ambiguous certificate as "unique"—and likewise resorted for interpretation to the history of the certificate, concluding that it conferred "intended use" authority (Pet. App. 7b).

The petition for review of the Commission's order presented the court of appeals with the most routine of cases. It is settled that the Commission's interpretation of its own certificates is entitled to great deference and is not to be overturned unless found to be arbitrary, capricious, or clearly erroneous. *Service Transfer Co.* v. *Virginia*, 359 U.S. 171, 177-178; *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 558. It is equally clear that the Commission may go behind the face of an ambiguous certificate and examine the record on which it was issued in order to determine what authority was granted. Here, too, a court will not reverse the Commission's determination unless its interpretation of the ambiguous certificate is arbitrary or clearly wrong. *Adirondack Transit Lines* v. *United States*, 59 F. Supp. 503 (S.D. N.Y.), affirmed, 324 U.S. 824; *Byers Transportation Co., Inc.* v. *United States*, 310 F. Supp. 1120 (W.D. Mo.).

The Commission acted responsibly in looking behind the face of petitioner's confusing certificate, and its interpretation is in complete accord with the certificate's history. Thus, the court of appeals quite properly viewed the case as appropriate for summary disposition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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